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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 105

JACOB LICHTER AND JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS SOUTHERN FIREPROOFING COMPANY, A CO-PARTNERSHIP, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1947.

CERTIORARI GRANTED JUNE 16, 1947.

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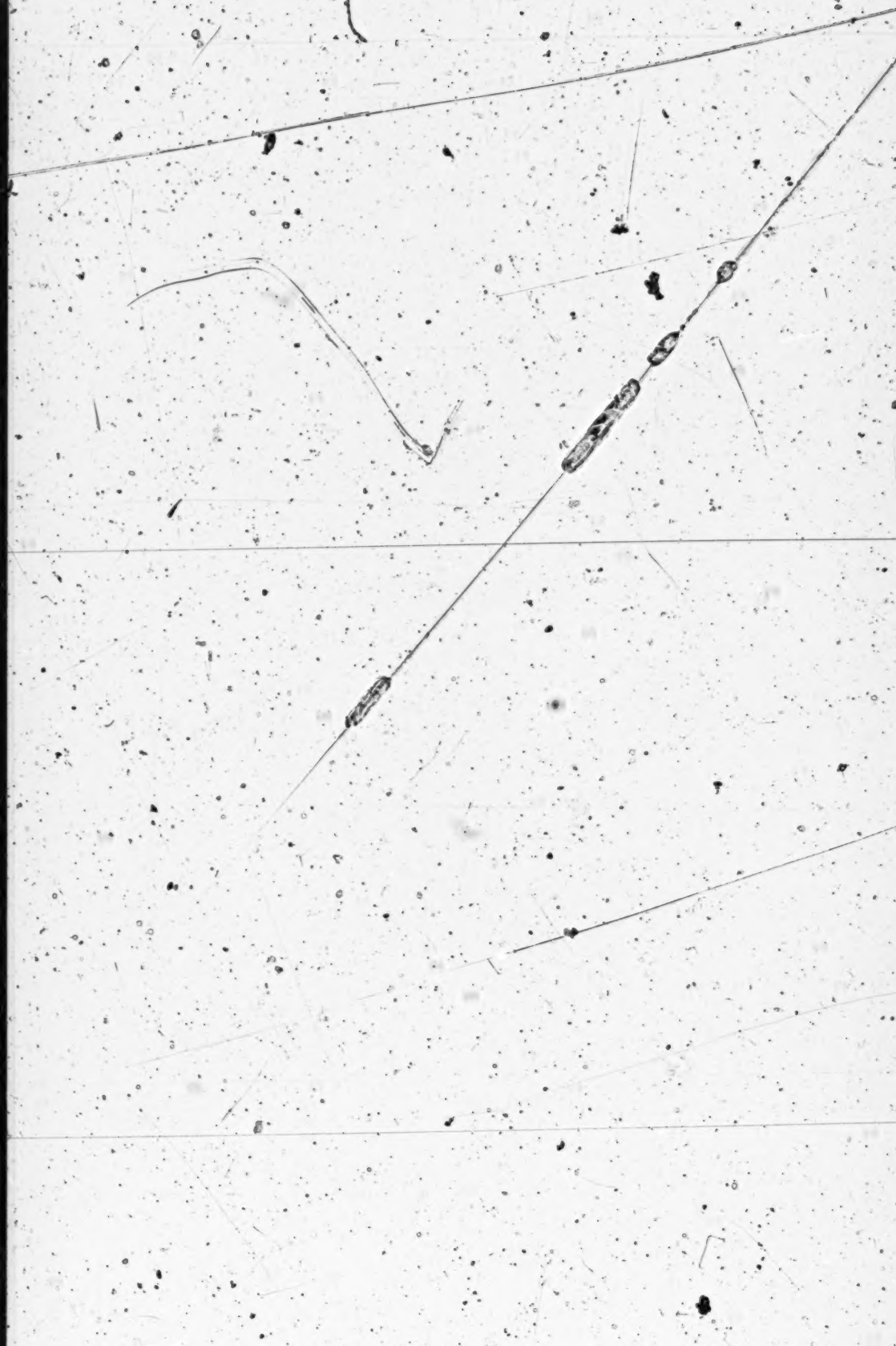

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 1176

Cincinnati

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACOB LICHTER, JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

Defendants.

COMPLAINT

(Filed May 9, 1945)

The United States of America, by Byron B. Harlan, United States Attorney for the Southern District of Ohio, says that:

1. Jacob Lichter and Jennie L. Lichter, defendants, reside in Cincinnati, Hamilton County, Ohio, and do business there under the firm name and style of Southern Fireproofing Company, a co-partnership.

2. This action is brought pursuant to Section 403 of the Renegotiation Act.

3. After notice to defendants proceedings for the renegotiation of defendants' subcontracts were had and conducted by representatives of the Secretary of War. Thereafter and on the 20th day of October, 1944, the Under Secretary of War, acting under and by virtue of the Renegotiation Act and pursuant to authority delegated to him duly determined that of the profits realized by defendants during the calendar year 1942 on their subcontracts subject to renegotiation Seventy Thousand Dollars ($70,000.00) thereof were excessive profits. A full, and true and correct copy of the order and determination of the Under Secretary of War is attached hereto as Exhibit A.

4. The tax credit to which defendants are entitled under Section 3806 of the Internal Revenue Code is in the amount of Forty-two Thousand Nine Hundred Eighty Dollars and Sixty-One Cents ($42,980.61).

5. On the 20th day of October, 1944, the Under Secretary of War directed defendants to repay on or before November 6, 1944, to the Treasurer of the United States the said excessive profits less the appropriate tax credit.

6. Defendants have not petitioned the Tax Court of the United States for a redetermination of the order made by the Under Secretary of War as provided in Section 403(e) (1 and 2) of the Renegotiation Act and the period for filing such a petition has expired.

7. Defendants have not paid to the United States and the United States has not withheld or by any other method eliminated said excessive profits in the amount of Seventy Thousand Dollars ($70,000.00) less the tax credit aforesaid nor any part thereof. Said amount is now due, owing and unpaid.

WHEREFORE, plaintiff prays judgment against defendants in the sum of Twenty Seven Thousand Nineteen Dol-

lars Thirty-Nine Cents ($27,019.39) with interest at six per cent from the 6th day of November, 1944, and costs.

BYRON B. HARLAN,
United States Attorney.

CHARLES B. GINOCCHIO,
Ass't United States Attorney,
Room 722, United States Post Office and Court House, Cincinnati, Ohio.

EXHIBIT "A"

WAR DEPARTMENT

OFFICE OF THE UNDER SECRETARY

WASHINGTON

DETERMINATION OF EXCESSIVE PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, which term refers to said Act as last amended 14 July 1943 and as affected by Title VII of the Revenue Act of 1943 so far as applicable.

WHEREAS, Southern Fireproofing Company, a partnership composed of Jacob Lichter and his wife, Jennie L. Lichter, of Cincinnati, Ohio (hereinafter referred to as the Contractor) holds the following subcontracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act),

said subcontracts being under prime contracts and being dated and for the amounts, all as described below:

Name of Prime Contractor and Prime Contract No.	Name and Location of Job	Date of Subcontract	Final Subcontract Price
Ring Construction Co. W-1088-eng-1638	Area C and E, Camp McCoy, Wisconsin.	3-30-42	$263,611.80
Pearson Construction Co. W-559-eng-5870	Division A-4, Camp Breckenridge, Morganfield, Kentucky.	4-5-42	115,135.84
Bass-Steenberg Fleisher Co. W-559-eng-5896	Division A-1, Camp Breckenridge, Morganfield, Kentucky.	4-9-42	74,533.48
Pearson Construction Co. W-2133-eng-24	Warehouse No. 72, Jeffersonville, Indiana.	4-25-42	65,485.11
Bass-Steenberg Co. W-1088-eng-1634	Area C, Camp McCoy, Wisconsin.	5-7-42	44,923.10
Sherry Richards Co. W-559-eng-5984	Armored Force Candidate School, Fort Knox, Kentucky.	5-23-42	30,000.00
Coppe Construction Co. W-559-eng-6009	Additional Housing, Ft. Knox, Kentucky.	6-5-42	58,500.00
Frank Messer and Son W-203-eng-1783	10 Mobilization Warehouses, Richmond, Kentucky.	7-20-42	58,500.63
Penker Construction Co. W-203-eng-1842	Combat Equipment Bldgs. Fort Knox, Kentucky.	8-31-42	844.20
		Total Receipts	$710,224.16

AND WHEREAS, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor on said subcontracts during the calendar year 1942; and

WHEREAS, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other

reliable sources, relating to the profits realized by the Contractor during said calendar year under said subcontracts; and

WHEREAS, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, THEREFORE, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) thereof, it is hereby found and determined:

That $70,000 of the profits realized by the Contractor during the calendar year 1942 under its said subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with the amount, if any, to which its partners as aforesaid, respectively, may be entitled under Section 3806 of the Internal Revenue Code, as computed by the Commissioner of Internal Revenue.

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination.

20 October, 1944

ROBERT P. PATTERSON
Under Secretary of War

JOINT ANSWER OF JACOB LICHTER AND JENNIE L. LICHTER, INDIVIDUALLY AND AS CO-PARTNERS

(Filed June 26, 1945)

The defendants answer the complaint herein as follows:

FIRST DEFENSE

1. Defendants admit that they reside in Cincinnati, Hamilton County, Ohio, and do business in that city under the firm name and style of SOUTHERN FIREPROOFING COMPANY, a co-partnership.

2. Defendants say that procedures purporting to be renegotiation of defendants' subcontracts were conducted by representatives of the Secretary of War; that said procedures were not in fact negotiations between said representatives and defendants, but consisted of unilateral fiats, orders and other actions by the representatives of the Secretary of War, on evidence which defendants were not and are not advised of, and without heed to credible and

persuasive evidence which defendants tendered, all as more fully set forth hereinafter.

3. Defendants admit that, on the 20th day of October 1944, Under Secretary of War Patterson, acting under color of authority granted to him by the Renegotiation Act and pursuant to authority purported to have been delegated to him in said Act, made a determination that, of the profits realized by defendants during the calendar year 1942 on defendants' subcontracts determined by said representatives to be subject to renegotiation, $70,000.00 thereof were excessive profits. Defendants admit that the copy of the said determination, attached as Exhibit A to the Complaint, is a true and correct copy of said order of October 20, 1944, which order defendants claim to be invalid at law and of no legal effect, for the reasons hereinafter set forth.

4. Defendants admit that, if said order of October 20, 1944 is valid in law and of legal effect, which defendants deny by virtue of this said defense and defenses hereinafter set forth in this answer, they are entitled, under Section 3806 of the Internal Revenue Code, to a tax credit of $42,980.61.

5. Defendants admit that under said order of October 20, 1944, Under Secretary of War Patterson directed defendants to pay, on or before November 6, 1944, to the Treasurer of the United States the said excessive profits claimed and determined by said order, less the proper tax credit referred to in the next preceding paragraph.

6. Defendants admit that they have not petitioned the Tax Court of the United States for a re-determination of said order, and that a period of time provided in Section 403(e) (1 and 2), of the Renegotiation Act, to wit, 90 days, has expired.

Defendants state that no provision of law requires them so to petition the Tax Court of the United States, and that no such petition has been filed for the reason, among other reasons, that said order is invalid and contrary to law, as will be more specifically set forth and referred to in this said defense and in other defenses hereinafter set forth in this answer.

7. Defendants admit that they have not paid to the United States, nor has the United States withheld or eliminated by any other method, said claimed excessive profits.

8. Defendants state that the business of the Southern Fireproofing Company is the contracting for and construction of brick masonry structures, customarily by subcontracts, and that said work is in general similar to brick masonry as the same has been known in the construction industry for many years; accordingly, costs, percentage of profit, and contract prices, were ascertained, calculated and realized in a manner generally known to and in the construction industry, which manner has in no way been influenced nor changed by the emergencies of the war.

Defendants state that all of said contracts set forth in said order, Exhibit A to Complaint, were subcontracts entered into after competitive bidding on the part of the principal contractors, and further competitive bidding on the part of defendants, and the acceptance of defendants' bid as the lowest and best bid for the work covered by said contracts.

Defendants accordingly state that the prices at which they performed their contracts during the calendar year 1942 were the fair, reasonable and equitable market prices, and contained no excessive profits.

9. Defendants state that the Congress of the United States has provided statutory enactments applicable to

defendants, and commonly known as Income Taxes, included in which are normal and surtaxes, which are designed by uniform rule to exact increased taxes from defendants in greater proportion as profit increases; that defendants have duly filed the appropriate income tax return on behalf of their co-partnership and have duly filed returns of their individual incomes, and have paid the tax shown on said returns to be due.

10. Defendants accordingly deny that said amount claimed in the Complaint as excessive profits, or any amount, or any profits or excess profits, are now due, owing or unpaid, and state that defendants in fact did not earn or realize any excessive profits during said calendar year 1942.

SECOND DEFENSE

Defendants incorporate, as if specifically re-written herein, all the allegations contained and made in the First Defense hereof.

11. Defendants state that said Renegotiation Act is contained in the following Public Laws:

> Section 403 of the 6th Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), Approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), Approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress) Approved July 1, 1943; Public 149, 78th Congress, approved July 14, 1943; and as amended in full by Section 701(b) of the Revenue Act of 1943 (Public 235, 78th Congress) Approved February 25, 1944;

and that plaintiff appears to claim that all of said laws are valid and subsisting laws as to profits realized by defendants in the calendar year 1942, despite the following:

a. That the Ring Construction Company contract, numbered W-1088-eng-1638 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

b. That the Pearson Construction Company contract, numbered W-559-eng-5870 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

c. That the Bass-Steenberg Fleisher Company contract, numbered W-559-eng-5896 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

d. That the Pearson Construction Company contract, numbered W-2133-eng-24 (Exhibit A, Complaint), was entered into prior to the enactment of any of said Public Laws.

12. Defendants state that the foregoing contracts were entered into prior to the passage of any of the Public Laws which comprise the Renegotiation Act, and accordingly said Renegotiation Act may not operate retrospectively or retroactively to change, alter, amend or divest defendants of the rights and emoluments secured therein at the time of execution; that accordingly, the action of the Under Secretary of War and his representatives, and the said order of October 20, 1944 (Exhibit A, Complaint), and the prayer of the Complaint herein, are repugnant to Amendment V. of the Constitution of the United States, and defendants would be deprived of their property without due process of law if any validity were given to said order, or if the prayer of the Complaint herein is allowed.

13. Defendants refer to Paragraph 11 hereof, and state that the original Congressional action which now constitutes a part of the Renegotiation Act, became effective April 28, 1942 (Public 528, 77th Congress); and that all of the contracts between defendants and their respective principal contractors, as set forth in Exhibit A to the Complaint

herein, were entered into prior to any amendment thereof, and accordingly all of said contracts, excepting those referred to and set forth in Paragraph 11 hereof, are governed, if at all, by the said Act of April 28, 1942.

Defendants further state that by said Act of April 28, 1942, the Secretary of the Department entering into a contract as described therein, is required to insert a renegotiation or recapture clause only in contracts for an amount in excess of $100,000.00 thereafter made by such Secretary; that said legislation has a further provision requiring the general contractor with the Government to insert a like renegotiation or recapture clause only in subcontracts for an amount in excess of $100,000.00.

14. Defendants state that Bass-Steenberg Fleisher Company contract, numbered W-559-eng-5896 (Exhibit A, Complaint), the Pearson Construction Company contract, numbered W-2133-eng-24 (Exhibit A, Complaint), the Bass-Steenberg Company contract, numbered W-1088-eng-1634 (Exhibit A, Complaint), the Sherry Richards Company contract, numbered W-559-eng-5984 (Exhibit A, Complaint), the Coupe Construction Company contract, numbered W-559-eng-6009 (Exhibit A, Complaint), the Frank Messer & Son contract, numbered W-203-eng-1783 (Exhibit A, Complaint), and the Penker Construction Company contract, numbered W-203-eng-1842 (Exhibit A, Complaint), are disclosed and alleged in the Complaint herein to be less in principal amount than the sum of $100,000.00.

15. Defendants state that, as to said contracts set forth in the next preceding paragraph hereof, there was no provision of law subjecting said contracts to renegotiation, nor requiring the contractor to insert renegotiation or recapture clauses in said contracts, and that in fact in none of said contracts was there contained a renegotiation or recapture clause.

16. Defendants state, therefore, that the Complaint fails to state a cause of action as against defendants.

THIRD DEFENSE

Defendants incorporate, as if specifically rewritten herein, all the allegations contained and made in the First and Second Defenses hereof.

17. Defendants state that, in said order of October 20, 1944, Exhibit A to Complaint, all of said contracts from which it is alleged defendants realized excessive profits in the calendar year 1942, are lumped as a group, and the determination that excessive profits have been realized during said calendar year 1942 is predicated upon a lump or group calculation of contract prices and profits thereof.

18. Defendants refer to Paragraphs 11 and 14 hereof, and state that all of said contracts set forth therein and in said Exhibit A were entered into, and were valid and subsisting contracts between defendants and their respective contracting parties, prior to the enactment of any provision of law authorizing or purporting to authorize a lumping or grouping of contracts for the purpose of determining whether excessive profits were realized in any calendar year; that the Act of April 28, 1942, clearly requires and provides that renegotiation procedures be restricted to individual contract bases, and in no way purports to permit lumping or grouping of contracts, or purports to permit the Secretary or his representatives to do so upon his own motion or discretion.

19. Defendants state, accordingly, that said order purporting to obligate and charge defendants for excessive profits realized, based upon a lump or group calculation, is invalid and contrary to law, for the reason that no legislative authority exists therefor.

20. Defendants state that the Amendment to the Renegotiation Act, Approved October 21, 1942 (Section 801 of the Revenue Act of 1942; Public 753, 77th Congress) provides that when any contractor or subcontractor holds two or more contracts or subcontracts, the Secretary in his discretion may renegotiate to eliminate excessive profits on some or all of such contracts or subcontracts as a group, without separately renegotiating the contract price of each contract or subcontract.

21. Defendants state that said Amendment to the Renegotiation Act, dated October 21, 1942, purports to bring within its requirements all contracts thereafter made, and all contracts theretofore made.

Defendants state that such enactment, purporting to bring within its provisions contracts made long before the enactment of said law, operates retroactively and retrospectively as to defendants, and therefore constitutes a repudiation of the contractual commitments of the United States, and illegally impinges upon the rights of defendants in its said contracts and the usufructs thereof, and consequently is violative of the Constitution of the United States and Amendment V thereof, by subjecting defendants' property to public use without compensation, and depriving defendants of their property without due process of law.

FOURTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all allegations contained and made in the First, Second and Third Defenses hereof.

22. Defendants state that all data, information and figures requested by any person to whom authority was delegated by the Secretary to act in reference to renegotiation of defendants' business was furnished, and that such submissions were prepared in accordance with the rules, regu-

lations and instructions of said administrative officials, and were submitted promptly upon said request.

23. Defendants state that, in each instance that such information and data were submitted, such submission was qualified as without prejudice to the opportunity to later claim that defendants' contracts were not subject to renegotiation, and without prejudice to the opportunity to later claim that the Renegotiation Act was unconstitutional and violative of defendants' constitutional rights.

24. Defendants further state that, upon request, they at all times met with the representatives of the Secretary in the steps and proceedings leading up to the order of October 20, 1944.

25. Defendants state that, notwithstanding the fact that information and figures were submitted to representatives of the Secretary, and notwithstanding that defendants appeared at conferences for the purpose of "negotiating" and discussing whether profits realized by defendants were in fact excessive, said representatives at no time would divulge to defendants the facts and figures leading up to and compelling their conclusions, nor would said representatives actually negotiate, consider or reciprocally examine into the nature or source or relevance of information upon which conclusions were based.

Defendants further state that said representatives from time to time stated that information and data, financial and otherwise, obtained from other sources, was used in arriving at conclusions and determinations with which defendants were confronted, but at no time would said representatives divulge the nature or source or relevance thereof, nor were defendants given an opportunity to examine said information. Defendants further state that it is set forth in said order of October 20, 1944, plaintiff's Exhibit A hereto, that "certain financial, operating and

other data submitted by the contractor or obtained by the Under Secretary of War from Governmental or other reliable sources, related to the profits realized by the contractor." Defendants state that they have never been apprised of what this "operating and other data" is which relates to defendants' profits, nor do they know the other sources from which this information and data were received by the Secretary. Defendants state that they have repeatedly requested knowledge of this information and the sources thereof, but that the same has been refused, and that opportunity to examine the information and to cross-examine the person submitting the said information has been denied them. Defendants further state that an opportunity has not been granted to defendants to refute with other evidence the said information and data.

26. Defendants state that the said order of October 20, 1944, was arrived at in secret, and is in no sense a result of negotiation; that a unilateral order, such as said order of October 20, 1944, is valid, legal and binding on defendants, if at all, only after a true negotiation; that negotiation, in its legal as well as its commonly accepted definition, connotes that both parties will discuss and consider all available and known factors; but that defendants, although they submitted information, and although they presented themselves at appointed times and places, never were given an opportunity to negotiate, nor to have a hearing in its legal sense, but instead were at all times faced with orders and fiats based upon information and data unknown to defendants, and were directed to accept said orders and fiats or suffer the penalties for non-payment as set forth in said Act.

27. Defendants state that said order and determination of October 20, 1944, was arbitrarily and capriciously deter-

mined, and therefore is wholly invalid in law and without legal effect.

FIFTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all the allegations contained and made in the First, Second, Third and Fourth Defenses.

28. Defendants state, as hereinabove set forth, that the Congress of the United States has provided statutory enactments applicable to defendants and commonly known as Income Taxes, included in which are normal and surtaxes, which are designed by uniform rule to exact increased taxes from defendants in greater proportion as profit increases; that said income tax laws provide substantial equality of treatment for all taxpayers similarly situated; that the Renegotiation Act, pursuant to which the Under Secretary of War, and his representatives, have purported to act, provides that the Secretary of the department involved, in this instance the War Department, is authorized, whenever in his sole opinion excessive profits have been realized, to refix the contract price and to recover thereafter such amount from the contractor or subcontractor as the case may be.

Defendants state that said Renegotiation Act is therefore in legal effect a taxing measure, designed to add to the revenues of the Treasury of the United States moneys which normally would be, should be and are, raised for carrying on the affairs of the Government and the effective prosecution of the war.

29. Defendants state that, as a taxing measure, said Renegotiation Act is violative of the minimal requirements of the Fifth Amendment to the Constitution of the United States, in that the moneys brought into the Treasury by virtue of said Renegotiation Act are not collected by uni-

form rule and with substantial equality of treatment of taxpayers similarly situated. Defendants state that said Act as a taxing measure is lacking in any fixed policy, standards or rules, and therefore it results and has resulted in radically different treatment to contractors, subcontractors and masonry contractors similarly situated; and that said Act, as it is lacking in specific standards to bring about substantial equality of treatment to those similarly situated, is discriminatory, and denies defendants the equal protection of the law, in violation of the Fifth Amendment to the Constitution; and in respect thereof said order of October 20, 1944, and likewise the Complaint herein, attempt to take defendants' property without due process of law and for the public use, without just compensation to defendants.

30. Defendants state that, if said Renegotiation Act is not a taxing measure, it purports to exercise powers reposing in the States composing the Union and which powers are not delegated to the United States of America, and is therefore violative of the Tenth Amendment to the Constitution of the United States.

SIXTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all allegations contained and made in the First, Second, Third, Fourth and Fifth Defenses hereof.

31. Defendants state that if the Renegotiation Act is not a taxing measure, and if said Act does not purport to exercise power reposing in the several States of the Union, but if said Renegotiation Act purports to exercise a power reposing in the United States of America to wage war and to defend the nation, that as to defendants such power is and has been exercised therein in a confiscatory and dis-

criminatory manner and constitutes the taking of defendants' property without compensation and without due process of law, contrary to the Constitution of the United States.

SEVENTH DEFENSE

Defendants incorporate, as if specifically rewritten herein, all allegations contained and made in the First, Second, Third, Fourth, Fifth and Sixth Defenses hereof.

32. Defendants state that, in the Act approved April 28, 1942, there was a complete absence of standards for the guidance of the Secretary or his representatives in the determination of excessive profits, and that there was contained therein no definition of the term "excessive profits" to mark the scope of the activities of the Secretary or his representatives, so that he or they would know whether their activities had been kept within the confines of the legislative will; that said Act directed the Secretary, or his representatives, "whenever in his opinion excessive profits have been realized," to renegotiate and recapture the same, but that such a broad and general order is wholly insufficient to inform administrators of the law as to the Congressional mind.

33. Complainants infer by the allegations of the Complaint that the Amendment dated October 21, 1942, is claimed to be here applicable. But defendants state that said Amendment is not here applicable to them, nor to any of said contracts set forth in Exhibit A to the Complaint.

Defendants state that said Amendment purports to define excessive profits as any amount of a contract or subcontract price which is found as the result of renegotiation to represent excessive profits; but it is patent that the mind of Congress is not made known by this purported definition, and that standards and policies circumscribing the Secre-

tary or his representatives in the determination of excess profits are not defined; and as a result of which, in any proceeding and in this proceeding, it would be and is impossible to determine what the will of Congress is or whether it has been obeyed.

34. Defendants therefore state that the Renegotiation Act as applicable to defendants is vague and uncertain, and lacking in specificity, and fails to comport with reasonable legislative standards, by reason whereof said legislation is violative of Amendment V of the Constitution of the United States.

EIGHTH DEFENSE.

Defendants incorporate, as if specifically rewritten herein, all the allegations contained and made in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses hereof.

35. Defendants state that, in said Act as claimed by Complainant as applicable herein, Congress has not specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data, its will shall be effective; that there is an absence of limits and standards for the guidance of the administrators of the Act; that authority to issue regulations for the uniform operation of the broad authority delegated is not granted; and that said Act specifically does not provide for the following, which should be and are included as minimal requirements in any valid delegation of authority:

a. Any standard to guide the Secretary by policy, rules or otherwise, in determining what are excessive profits and whether or not excessive profits have been realized by defendants.

b. Any limitation upon or description of the character of material, information and data which the Secretary may consider.

c. A hearing, public or otherwise, with rights flowing therefrom, including the reception of the evidence, and the right to hear the evidence obtained by the Government, and to cross-examine in reference thereto.

d. Any rule, standard or guide in respect to disclosures to defendants of the material, information, data or evidence considered, and how the same was applied or used.

e. Any standards, guides or requirements in reference to a statement of findings of fact and the basis thereof.

f. Any standards, guides or rules which would require the Secretary to take into account such pertinent considerations as:

(1) The efficiency of the contractor and his attainments as to quantity and quality of production, and his ability to reduce costs and economize in materials and manpower.

(2) The reasonableness of the costs of the defendants.

(3) Peace-time earnings and comparison of war and peace-time profits.

(4) The nature, amount and sources of capital employed in the business; that is to say, whether or not it is public or private capital.

(5) The risk assumed.

(6) Nature and extent of contribution to the war effort.

(7) Energy and contribution, and inventive and developing genius and co-operation in the support of the war effort.

(8) The character of the business itself, including the complexity of the technique.

(9) Such other factors the consideration of which the public interest and fair equitable dealing may require.

36. Said Renegotiation Act, and the Complaint herein, therefore, purport to take the property of defendants whenever in the opinion of the Secretary or his representa-

tives, unguided by proper delegated standards, excessive profits have been realized.

37. Defendants state that, by reason of the failure of the Congress of the United States to define and limit the authority of the person to whom it delegated authority under said Renegotiation Act, their constitutional rights under Article I, Section 1, and Section 8, Clause 18, and Article III, Section 1, of the Constitution of the United States are impinged and violated.

38. Defendants further state that said Renegotiation Act delegates to officers, whose lawful function is neither legislative nor judicial, legislative and judicial power; that it delegates to the Secretary and his representatives unlimited discretion in the application of the indefinite legislation; and that said Act fails to define and limit the action of the Secretary and his representatives, and fails to provide rules, standards, and procedural safeguards against arbitrary and capricious exercise of such discretion; by reason whereof said legislation is violative of Article I, Section 1, and Section 8, Clause 18, and Article III, Section 1, of the Constitution of the United States.

WHEREFORE, defendants pray that the Complaint be dismissed and that they be ordered to go hence with their costs.

PAUL W. STEER,
STEER, STRAUSS & ADAIR,
Attorneys for Jacob Lichter and Jennie L. Lichter individually and as co-partners,
2215 Union Central Building,
Cincinnati 2, Ohio.

State of Ohio, County of Hamilton, ss:

Jacob Lichter, being first duly sworn, says that he is one of the defendants in the above entitled action; that he has read the foregoing Joint Answer of Jacob Lichter and Jennie L. Lichter, individually and as co-partners, and that the facts stated therein are true.

JACOB LICHTER

SWORN to before me and subscribed in my presence this 25th day of June, 1945.

LILLIAN BUSSEY,
Notary Public in and for Hamilton County, Ohio.
My Commission expires November 8, 1946.

RECEIPT

Received, three copies of the above Joint Answer of Jacob Lichter and Jennie L. Lichter, individually and as co-partners, this 26th day of June, 1945.

BYRON B. HARLAN,
United States Attorney.

CHARLES B. GINOCCHIO,
Ass't United States Attorney,
Room 722, United States Post Office and Court House, Cincinnati, Ohio.

MOTIONS FOR JUDGMENT ON THE PLEADINGS AND FOR SUMMARY JUDGMENT

(Filed August 10, 1945)

Now comes the plaintiff, the United States of America, and by its attorneys moves the Court for judgment on the pleadings on the grounds that

(a) plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings; and

(b) the answer does not state a defense to the claim set forth in the complaint.

In the alternative plaintiff moves for summary judgment on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

This Court has no jurisdiction of any question as to which the Tax Court of the United States is given exclusive jurisdiction by Section 403(e) of the Renegotiation Act.

These motions are based upon the affidavits filed on behalf of plaintiff and on the pleadings, files and records in this case.

RAWLINGS RAGLAND,
Acting Head, Claims Division.

BYRON B. HARLAN,
United States Attorney.

CHARLES B. GINOCCHIO,
Ass't United States Attorney,
Attorneys for Plaintiff.

AFFIDAVIT OF JACOB LICHTER

(Filed November 13, 1945)

State of Ohio, County of Hamilton, ss:

Jacob Lichter, being first duly sworn, says that he is one of the defendants herein; that during the latter part of 1942, and the beginning of 1943, various conferences regarding negotiation were held throughout the country, under the auspices of the War Department; that one of these conferences was held at Columbus, Ohio, on January 21, 1943; and that the purpose of said conference was to explain and interpret renegotiation to construction industries in the southeastern area of the United States.

Affiant further says that the principal speaker and conductor of the Conference was Harry W. Loving, Chief of Price Adjustment Section, Office of Chief of Engineers, and that a transcript of Mr. Loving's statements there made was prepared by said Price Adjustment Section and reduced to writing and later mailed to all persons of the construction industry in said area.

Affiant further says that the quoted statements of Mr. Loving contained in Brief of Defendants in Opposition to Motion for Judgment on the Pleadings and for Summary Judgment were set forth in said transcript of the proceedings which was sent to defendants following the conference by the Price Adjustment Section of the Office of Chief of Engineers.

Further affiant saith not.

JACOB LICHTER

SWORN to before me and subscribed in my presence this 12th day of November, 1945.

LILLIAN BUSSEY,
Notary Public, Hamilton County, Ohio.
My Commission Expires Nov. 8, 1946.

MOTION TO DISMISS

(Filed March 8, 1946)

The defendants above move that the Bill of Complaint herein be dismissed on the ground that it fails to state a claim upon which relief can be granted against defendants, and for the reason that the alleged excessive profits claimed are exempt under and by virtue of Section 403 (i)(l)(E)(F) of the Renegotiation Act, as contained in the Revenue Act of 1943, Public 235, 78th Congress, 2nd Session.

STEER, STRAUSS & ADAIR
PAUL W. STEER,
Attorneys for Defendants,
2115 Union Central Bldg.,
Cincinnati 2, Ohio.

JOHN F. SONNETT,
Assistant Attorney General,
RAY J. O'DONNELL,
Acting United States Attorney,
FREDERICK W. JOHNSON,
Assistant United States Attorney,
Attorneys for Plaintiff.

Of Counsel
WALTER LOWRY,
A. MORRIS KOBRICK,
Attorneys, Dept. of Justice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 21, 1946)

This cause came on for hearing before the Court on February 18, 1946, on the motions of plaintiff for summary judgment and for judgment on the pleadings, and the Court, having considered the pleadings, the motions filed by plaintiff, the affidavits filed in support thereof and in opposition thereto, and having considered the motion to dismiss the complaint thereafter filed by defendants and the briefs and arguments of counsel, and having taken the case under advisement, now finds the facts and states the conclusions of law as follows:

I

FINDINGS OF FACT

(1) At all times herein mentioned, defendants resided in Cincinnati, Hamilton County, Ohio, and did business in that city as co-partners under the firm name and style of Southern Fireproofing Company.

(2) The business of the Southern Fireproofing Company is the construction of brick masonry structures customarily by subcontracts, a type of work which is in general similar to brick masonry work as it has been known in the construction industry for many years. Defendants allege, and for the purpose of these findings it is assumed, that the prime contracts set out in Exhibit A to the complaint were contracts with a Department, awarded as a result of competitive bidding for the construction of buildings and facilities, and that the subcontracts involved in this action were subcontracts under said prime contracts, and were obtained by defendants after further competitive bidding.

(3) On October 20, 1944, Robert P. Patterson, then Under Secretary of War, acting pursuant to the Renegotiation Act

as amended, made a unilateral order (in the words and figures set out in Exhibit A to the complaint) determining that defendants had realized excessive profits of $70,000 during the calendar year 1942 on the subcontracts described below:

Name of Prime Contractor and Prime Contract No.	Name and Location of Job	Date of Subcontract	Final Subcontract Price
Ring Construction Co. W-1088-eng-1638	Area C and E, Camp McCoy, Wisconsin.	3-30-42	$263,611.80
Pearson Construction Co. W-559-eng-5870	Division A-4, Camp Breckenridge, Morganfield, Kentucky.	4-8-42	115,135.84
Bass-Steenberg Fleisher Co. W-559-eng-5896	Division A-1, Camp Breckenridge, Morganfield, Kentucky.	4-9-42	74,533.48
Pearson Construction Co. W-2133-eng-24	Warehouse No. 72, Jeffersonville, Indiana.	4-25-42	65,485.11
Bass-Steenberg Co. W-1088-eng-1634	Area C, Camp McCoy, Wisconsin.	5-7-42	44,923.10
Sherry Richards Co. W-559-eng-5984	Armored Force Candidate School, Fort Knox, Kentucky.	5-23-42	30,600.00
Coupe Construction Co. W-559-eng-6009	Additional Housing, Ft. Knox, Kentucky.	6-8-42	56,500.00
Frank Messer and Son W-203-eng-1783	10 Mobilization Warehouses, Richmond, Kentucky.	7-20-42	58,590.63
Penker Construction Co. W-203-eng-1842	Combat Equipment Bldgs. Fort Knox, Kentucky.	8-31-42	844.20
		Total Receipts	$710,224.16

Defendants' profit, before taxes and before renegotiation, on these subcontracts was determined by the representatives of the Under Secretary of War to be $136,429.00.

(4) On October 20, 1944, the Under Secretary of War directed defendants to pay to the Treasurer of the United States on or before November 6, 1944, said excessive profits

of $70,000, less the tax credit, if any, to which defendants might be entitled under the provision of Section 3806 of the Internal Revenue Code.

(5) The tax credit to which defendants are entitled under Section 3806 of the Internal Revenue Code is in the sum of $42,980.61.

(6) Defendants have refused to pay to the United States said excessive profits of $70,000 less the aforesaid tax credit.

(7) Defendants have not filed a petition in the Tax Court of the United States for a redetermination of the amount of their excessive profits and the time for filing such a petition has expired.

(8) There is no genuine issue between the parties as to any material fact and plaintiff is entitled to judgment as a matter of law.

II

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over this action and the parties thereto.

(2) The Renegotiation Act as enacted on April 28, 1942, and as thereafter amended is a constitutional exercise of the war powers of the Congress. It does not involve an unlawful delegation of legislative power to executive officials nor an exercise of judicial power by those officials. It does not involve an exercise of eminent domain powers nor has there been in this case any taking of defendants' property for public use in violation of the Constitution. The statute is not so vague or uncertain as to offend the Fifth Amendment to the Constitution nor does it deprive defendants of due process of law.

(3) The Renegotiation Act applies by its terms to the subcontracts of defendants executed before the statute was

passed and as to which final payment had not been made on April 28, 1942. Thus applied, the statute is constitutional.

(4) The Sixth Supplemental National Defense Appropriation Act of 1942, dated April 28, 1942 (Public Law 528, 77th Congress, 2nd Sess.), did not provide for or permit defendants to have a determination of excess profits in the several District Courts of the United States; that if said Sixth Supplemental National Defense Appropriation Act, as aforesaid, did so provide, the Revenue Act of 1943 deprived defendants of this right to have determined the excess profits in the several District Courts of the United States for fiscal years commencing before July 1, 1943, and for fiscal years commencing after July 1, 1943, and required all such determinations to be had in the Tax Court of the United States; and accordingly, for 1942 business, after the enactment of the Revenue Act of 1943, defendants did not have the option to have a determination of their excess profits, if any, in the District Court on the one hand, or in the Tax Court on the other hand, but were compelled to appeal any determination of excess profits to the Tax Court of the United States.

(5) The Tax Court of the United States has exclusive jurisdiction under the statute to determine all questions of law and fact relating to the amount of defendants' excessive profits for the calendar year 1942, and the failure of defendants to petition the Tax Court of the United States for a redetermination of the amount of their excessive profits renders the following allegations of the answer immaterial:

(a) That the Under Secretary of War and his representatives failed to "negotiate" with defendants and to accord to defendants a due process hearing;

(b) That defendants in fact realized no excessive profits;

(c) That the determination of the Under Secretary was arbitrary and capricious in amount and reached by arbitrary and capricious procedures;

(d) That defendants' subcontracts were exempt from renegotiation because they were subcontracts awarded as a result of competitive bidding, under prime contracts with a Department, and awarded as a result of competitive bidding, for the construction of buildings and facilities.

(e) That certain of defendants' subcontracts were exempt from renegotiation because they were less in amount than $100,000.

(f) That defendants' subcontracts were renegotiated as a group rather than one at a time.

(5) By reason of the failure of defendants to petition the Tax Court for a redetermination of their excessive profits, the order of the under Secretary has become final and is free from attack.

(6) If it be assumed that the Court has jurisdiction to determine whether or not defendants' subcontracts are subject to renegotiation, the Court concludes that the Renegotiation Act does apply to contracts and subcontracts less in amount than $100,000 and that, at least as far as the year 1942 (which is the year here involved) is concerned, to subcontracts calling for construction work. Hence, defendants' subcontracts were subject to renegotiation.

(7) The Renegotiation Act authorizes renegotiation of contracts or subcontracts in a group and the amendment of October 21, 1942 to the statute specifically authorizing such group renegotiation and made retroactive to April 28, 1942, is lawful and constitutional as applied to defendants' subcontracts executed prior to October 21, 1942, and prior to April 28, 1942.

(8) The answer does not state a defense to the claim set forth in the complaint.

Judgment

(9) The motions of plaintiff for judgment on the pleadings and for summary judgment are hereby granted.

It is ordered that judgment be entered for plaintiff, the United States of America, against defendants, Jacob Lichter, and Jennie L. Lichter, jointly and severally, in the amount of $27,019.39, with interest thereon at the rate of 6 per cent per annum from the 6th day of November, 1944, until paid, and with costs to the plaintiff.

Dated:

JOHN H. DRUFFEL,
Judge of the United States District Court.

Have seen:
STEER, STRAUSS & ADAIR,
PAUL W. STEER.

Have seen:
RAY J. O'DONNELL,
United States Attorney.
By W. J. DAMMARELL,
Ass't United States Attorney.

JUDGMENT

(Filed June 21, 1946)

This cause coming on to be heard upon motions of plaintiff for judgment on the pleadings and for summary judgment and upon motion of the defendants to dismiss plaintiff's complaint heretofore filed herein, the Court finds the motions of plaintiff well taken and hereby grants the same; and further finds said motion of defendants not well taken and hereby overrules the same. To all of which defendants duly except;

It is therefore ORDERED AND ADJUDGED that plaintiff, the United States of America, have judgment against

and recover of and from defendants, Jacob Lichter and Jennie L. Lichter, jointly and severally, the sum of $27,019.39, with interest thereon at the rate of 6 per cent per annum from the 6th day of November, 1944, and that plaintiff shall have and recover from said defendants its costs and charges in this behalf expended and shall have execution to enforce the terms of this judgment.

To all of which defendants duly except.

JOHN H. DRUFFEL,
Judge of the United States District Court.

Have seen:

WILLIAM J. DAMMARELL,
Assistant United Stated Attorney.

Have seen:

STEER, STRAUSS & ADAIR,
PAUL W. STEER,
Attorneys for Defendants.

NOTICE OF APPEAL

(Filed July 8, 1946)

To the Honorable John H. Druffel, Judge of the District Court of the United States in and for the Southern District of Ohio, Western Division:

Notice is hereby given that Jacob Lichter and Jennie L. Lichter, doing business as the Southern Fireproofing Company, defendants herein, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from an order entered on the 21st day of June, 1946, granting judgment for plaintiff in the amount of $27,019.39, together with interest and costs; and from the findings of fact and

conclusions of law entered in said District Court on said date.

STEER, STRAUSS & ADAIR,
PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Defendants.

HON. TOM CLARK,
Attorney General of the United States,
Washington, D. C.

RAY J. O'DONNELL,
United States District Attorney,
Federal Building, Cincinnati 2, Ohio.

WILLIAM J. DAMMARELL,
Assistant United States District Attorney,
Federal Building, Cincinnati 2, Ohio,
Counsel for the Government.

Copy handed to Ass't U. S. Atty., Wm. J. Dammarell, 7/8/46.

PAUL W. STEER

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed July 8, 1946)

To the Honorable John H. Druffel, Judge of the District Court of the United States in and for the Southern District of Ohio, Western Division:

Appellants, Jacob Lichter and Jennie L. Lichter, doing business as the Southern Fireproofing Company, designate the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Complaint.
2. Joint Answer of Jacob Lichter and Jennie L. Lichter, individually and as co-partners doing business as the Southern Fireproofing Company.
3. Motion for Judgments on the Pleading, and for Summary Judgment.
4. Affidavit of Jacob Lichter.
5. Motion of Defendant to Dismiss.
6. Findings of Fact and Conclusions of Law.
7. Judgment Entry.
8. Notice of Appeal.
9. This Designation of Contents of the Record.
10. Statement of Points on which Appellants intend to Rely.
11. Clerk's Certificate.

STEER, STRAUSS & ADAIR,
PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Appellants, Jacob Lichter and Jennie L. Lichter, doing business as Southern Fireproofing Company.

Appellants' Statement of Points to Be Relied Upon

Copy of the foregoing Designation of Contents of Record On Appeal is hereby acknowledged this —— day of July, 1946.

WILLIAM J. DAMMARELL,
Assistant United States District Attorney.

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON

(Filed July 8, 1946)

To the Honorable Judge of the District Court of the United States in and for the Southern District of Ohio, Western Division:

POINT I

The Court erred in granting the plaintiff's motion for judgment on the pleadings, and for summary judgment.

POINT II

The Court erred in overruling the motion of defendants to dismiss the within action.

POINT III

The Court erred in granting judgment for plaintiff.

POINT IV

The Court's following finding of fact is erroneous:

"(8) There is no genuine issue between the parties as to any material fact and plaintiff is entitled to judgment as a matter of law."

POINT V

The following conclusions of law are erroneous:
Paragraphs 2, 3, 4, 5, 5, 6, 7, 8, and 9.

STEER, STRAUSS & ADAIR,
By PAUL W. STEER,
2215 Union Central Building,
Cincinnati 2, Ohio,
Counsel for Defendants.

HON. TOM CLARK,
Attorney General of the United States,
Washington, D. C.,
RAY J. O'DONNELL,
United States District Attorney,
Federal Building, Cincinnati 2, Ohio,
WILLIAM J. DAMMARELL,
Assistant United States District Attorney,
Federal Building, Cincinnati 2, Ohio,
Counsel for the Government.

RECEIPT

Receipt of copy of the foregoing Statement of Points To Be Relied Upon is asknowledged this 8th day of July 1945.

RAY J. O'DONNELL,
United States District Attorney.

CLERK'S CERTIFICATE

I, Harry F. Rabe, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify that the foregoing pages numbered from 1 to 36, inclusive, contain a true and correct copy of the record and proceedings indicated in the Designation of Contents of Record on Appeal, found on page 34, as the same appear of record and on file in the office of said Clerk in said Court in the above entitled cause.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, the —— day of ————, 1946.

HARRY F. RABE, *Clerk,*

Deputy.

PROCEEDINGS IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(Februa y 12, 1947—Before: HICKS, SIMONS and MILLER, J.J.)

This cause is argued by Paul Steer for Appellants and by Ellis Lyons for Appellee and is submitted to the Court.

JUDGMENT

(Filed March 10, 1947)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed March 10, 1947)

Before HICKS, SIMONS and MILLER, Circuit Judges.

SIMONS, Circuit Judge. The questions involved in this appeal relate to the coverage and the constitutional validity of the Renegotiation Act of April 28, 1942 (56 Stat. 226) as amended by the Revenue Act of 1943 (the Act of February 25, 1944, 58 Stat. 21). The appeal is from a summary judgment entered in favor of the government against the appellants for the recovery of excessive profits made under subcontracts on construction work done for the War Department.

The appellants reside in Cincinnati and their partnership will be referred to as Southern. In 1942 Southern was a subcontractor in nine subcontracts awarded to it after competitive bidding, for the construction of buildings and facilities. The prime contracts likewise resulted from such bidding. On October 20, 1944, Robert P. Patterson, then Undersecretary of War, issued an order pursuant to the Renegotiation Act, determining that Southern had realized, during 1942, excessive profits of $70,000 on its subcontracts, and directed it to pay into the Treasury the amount of such excessive profits less a tax credit of $42,980.61. Southern filed no petition with the Tax Court for a redetermination of the Undersecretary's order, and the time for filing such petition has long since expired. Of the nine contracts involved, four were executed prior to April 28, 1942, the date of the original Renegotiation Act, and the remaining five were executed prior to October 21, 1942, the date of the initial amendment to the Renegotiation Act. Of the nine contracts involved, only two were in an amount in excess of $100,000 and were executed prior to April 28, 1942. The remaining seven were for amounts less than $100,000. Southern having failed to comply with an order of the Undersecretary of War to repay the determined excessive profits to the government, the United States brought suit for recovery. Southern defended on the ground that all of the subcontracts were specifically exempt from renegotiation

by the terms of the Act, as amended; that in any event its contracts executed prior to April 28, 1942 and those less in principal amount than $100,000 were not renegotiable; and finally, that the Renegotiation Act is unconstitutional.

The district court held the Renegotiation Act as originally enacted, and as subsequently amended, to be a constitutional exercise of the war powers of the Congress, that it applied to excessive profits realized under contracts entered into prior to April 28, 1942, and as so applied was likewise constitutional; that the failure of the appellants to seek a review *de novo* in the Tax Court of the United States, of the Undersecretary of War's determination of excessive profits as provided by § 403 (c)(2) of the Renegotiation Act, foreclosed the appellants from asserting their defenses, other than the constitutional invalidity of the Act, in the District Court of the United States.

Southern's contention that the district court had jurisdiction to consider all of its defenses, derives from the chronological sequence of the Act and its amendments, and rests specifically upon the phrasing of the amendatory provisions of §§ 403(c)(2) and 403(c) of the Revenue Act of 1943. It points out that prior to that amendment the rights of any person involved in renegotiation procedures were the same as in reference to other statutes, so that the validity of any claim or defense could be determined in a judicial proceeding. This is made clear, it says, by the fact that the original bill before the Congress contained a provision prohibiting a contractor from going into the courts, which was stricken before its passage. It also points out that the requirement, if it be a requirement, that a contractor submit his claims to the Tax Court of the United States, first appeared in the Revenue Act of 1943, enacted February 25, 1944, and that its contracts, all being part of its 1942 business, were not thereby affected. A proper appraisal of this contention requires consideration of the terms of the amendment. Section 403(c)(2) provides:

> "Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days . . . after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days . . . after the date of such determination, file a petition with the Tax Court of the United States for a redetermination thereof."

It urges that this language is permissive and not mandatory, and that this is made clear by contrast with the phrasing of § 403(c), which is as follows:

> ". . . . If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e)(1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. . . . ."

It urges also that by § 403(c)(6) the application of subsection (c) is limited to amounts received or accrued

for fiscal years ending after June 30, 1943, the provision being in the following language:

> "This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, . . ."

From this comparison of sections it is argued that, in the absence of the filing of a petition with the Tax Court, the order that is by § 403(c) declared to be final and conclusive and not subject to review or determination by any court, applies only to amounts received or accrued under renegotiable contracts for fiscal years ending after June 30, 1943. Even were the question open it would not be difficult to reject this contention. Section 403(e)(1) of the Act provides that the Tax Court ". . . shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits. . . ." In conferring jurisdiction upon a court or administrative tribunal it is neither novel nor unusual to use the term "may" in referring to the right of an aggrieved person to initiate proceedings. Indeed, a mandatory term such as "shall," would be in negation of the clear purpose of the Congress, for in conferring upon persons the right to avail themselves of remedies, the Congress does not undertake to compel them to do so, and if an option is implicit in the term "may," it is an option not as between the Tax Court and a constitutional court, but an option to seek or refrain from seeking review, and so to abide the administrator's determination. Moreover, it is incongruous to suggest that a procedure which is to be final and conclusive and not subject to review or redetermination by any court, permits avail to a court from which appeals lie, extending in some cases even to review by the Supreme Court of the United States.

But the question is not open. It was settled, in so far as present issues are concerned, by *Macauley* v. *Waterman SS. Corp.*, 327 U. S. 540, in reliance upon *Myers* v.

Bethlehem Shipping Corp., 303 U. S. 41. There it was held, in rejecting argument similar to that here presented, that § 403(e)(1) confers power upon the Tax Court to decide questions of coverage, for a decision as to what are and what are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits, and the legislative history of the Renegotiation Act shows that the Congress intended the Tax Court to have jurisdiction to decide questions of fact and law. The latter included the issue raised there as it includes the issues raised here. The *Waterman* case is even broader than that in its scope, for even were we to concede that the language of the jurisdictional grant to the Tax Court is permissive rather than mandatory, Southern would still be foreclosed in presenting its claims or defenses in the district court, by the application made in the *Waterman* case of the rule which requires a litigant, before resorting to judicial remedies, to exhaust his administrative remedies. Of similar import is *U. S.* v. *Ruzicka*, — U. S. —; decided December 16, 1946. There, in considering the general scheme of the Agricultural Act of 1937, 7 U. S. C. 601 et seq., it was said, "This is not *Stark* v. *Wickard*, 321 U. S. 288. In that case it was concluded that since Congress had provided no administrative remedy for a producer to review the legality of an order against him, presumably the courts were not closed to him. But by § 8c(15) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete." If the Renegotiation Act is a constitutional exercise of the war powers of the government and was in this case constitutionally applied, the district court was right in granting summary judgment.

But Southern urges that the Act itself is unconstitutional and the government, in argument, concedes that the court was not without jurisdiction to determine whether the Act was constitutional upon its face. Southern challenges validity on the ground that the Act contains no standards for guidance in renegotiation; that

there is no definition of the term "excessive profits," no requirements of methods to be followed in administration by which Congress, the courts or public may determine whether the congressional policy has been executed. While the constitutional validity of the Renegotiation Act has not yet been presented to the Supreme Court, its decisions in comparable cases clearly indicate that recognized tests of constitutionality have been met, *Yakus* v. *U. S.*, 321 U. S. 414; *Hirabayashi* v. *U. S.*, 320 U. S. 81, 93, and inferior and intermediate courts which have considered validity are in accord. *R. E. Spaulding et al.* v. *Douglas Aircraft Co., Inc.*, 154 Fed. (2d) 419 (C. C. A. 9); *U. S.* v. *A. W. Pownall et al.*, 65 F. Supp. 147 (S. D. Cal.). So with its retroactive application. As was said by District Judge Wyzanski in *U. S.* v. *Alexander Wool Combing Co.*, 66 F. Supp. 389 (D. Mass.), in rejecting a claim that the retroactive application of the Act would be in violation of the Fifth Amendment, "If that claim could prevail in the face of *Welch* v. *Henry*, 305 U. S. 134, and *United States* v. *Hudson*, 299 U. S. 498, the place to have raised it initially was the Tax Court."

Southern's principal contention relates to the lack of precise definition of the term "excessive profits." It would be strange, indeed, if, after public discussion and criticism of excessive profits of war suppliers in two world wars and the period intervening, there would not have developed in the mind of the Congress and of administrators, some concept of the evil that the phrase connotes. There are terms in legal parlance, such as "reasonable man," or the term "invention" in the patent law, that are impossible to define, yet serve a useful purpose in assaying conduct, measuring achievement or abstractions, and courts and legislatures have evolved tests by which their application may be governed. The present statute is not without such tests, for § 701 (b) requires, in determining excessive profits, that consideration be given to the efficiency of the contractor; the reasonableness of his costs and profits; the amount and source of public and private capital employed and his net

worth; the extent of risk assumed; the nature and extent of his contribution to the war effort; the character of his business, including the complexity of his manufacturing technique; and such other factors, the consideration of which the public interest and fair and equitable dealing may require.

No constitutional infirmity inheres in a statutory grant of discretion to administrators in executing the policy of the Congress. Without discretionary latitude, narrow or broad, as the situation requires, enforcement would in most cases be impossible. As was said in *Yakus* v. *U. S.*, supra, at 424, "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate."

The judgment below is affirmed.

CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Jacob Lichter et al. d/b/a Southern Fireproofing Company* v. *United States of America*, No. 10,312, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 10th day of April, A. D. 1947.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 16, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.